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Comments: No Ifs, Ands or Butts: Big Tobacco Is Fighting for Its Life Against a New Breed of Plaintiffs Armed with Mounting Evidence

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NO *IFS*, *ANDS* OR *BUTTS*: BIG TOBACCO IS FIGHTING FOR ITS LIFE AGAINST A NEW BREED OF PLAINTIFFS ARMED WITH MOUNTING EVIDENCE

I. INTRODUCTION

The federal government has estimated that ten million people have died of smoking-related illnesses.¹ That number continues to grow at a rate of 400,000 deaths per year, making it the number one preventable cause of death in the United States.² Moreover, \$50 billion is spent each year in direct medical costs,³ and over five million years of potential life are lost annually from smoking.⁴ One might expect that cigarettes would be regulated, perhaps even banned, or that tobacco companies would be held financially liable for such extensive damages. Instead, tobacco is a \$45 billion a year industry⁵ that has boasted for decades that it has not paid a dime for such claims.⁶ Since the 1950s, over three hundred consecutive claims have been defeated by “big tobacco.”⁷ The industry has flourished by selling a product that causes many of its consumers to become sick and even die.

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1. See Mark Curriden, *The Heat is On*, 80 A.B.A. J. 58, 58 (1994).
 2. See CDC's *Tobacco Information & Prevention Sourcepage* (visited Sept. 5, 1997) <<http://www.cdc.gov/nccdphp/osh/tobacco.htm>>.
 3. See *id.*
 4. See *id.*
 5. See Henry Weinstein & Jack Nelson, *Untested Theory Becoming Tobacco Firms' Top Threat Courts*, L.A. TIMES, Aug. 4, 1996, at A1, available in 1996 WL 11255519.
 6. See Curriden, *supra* note 1, at 58. However, Liggett & Myers Tobacco Co. (Liggett) without admitting wrongdoing, has paid out \$1 million as part of a March 1996 settlement with five states. See *Liggett Pays First Part of Tobacco Settlement*, WALL ST. J., April 9, 1996, at A10, available in 1996 WL-WSJ 3097975. The settlement with Florida, Massachusetts, Mississippi, West Virginia, and Louisiana provides that Liggett will also pay another \$4 million over the following ten years, as well as 2.5% of the company's pre-tax profits for the next twenty-five years. See Milo Geyelin, *Liggett, Five States Set Pact Covering Treatment of Smoking-Related Illnesses*, WALL ST. J., Mar. 18, 1996, at A3, available in 1996 WL-WSJ 3095173. The payments are to help defray the cost of treating Medicaid recipients with smoking-related illnesses. See *id.*; see also *infra* text accompanying notes 246-58, 261-66; see also *infra* note 278 and accompanying text.
 7. See Curriden, *supra* note 1, at 58.

This Comment explores the various legal theories utilized by plaintiffs in the past forty years of tobacco litigation. This Comment also explains why plaintiffs have been unsuccessful and the tobacco industry has been victorious. Further, this Comment examines the most recent battles, including actions brought by states to recover Medicaid expenses in treating smoking-related illnesses.

In 1996, Maryland joined the fight,⁸ and like many other states,⁹ Maryland is relying on the growing evidence of internal documents and insider testimony. This new evidence, in conjunction with lessons learned from past losses, may provide the current army of plaintiffs with the tools necessary to reach long-awaited success. The fall of the tobacco industry may be just around the corner.

II. HISTORY OF TOBACCO LITIGATION

A. *First Wave: 1950s*

In 1954, in the midst of early studies identifying a link between smoking and cancer,¹⁰ Eva Cooper began what has been termed "the three waves" of tobacco litigation¹¹ by suing R.J. Reynold's Tobacco Co. (R.J. Reynolds) for the wrongful death of her husband.¹² Cooper alleged that her husband contracted lung cancer from smoking Camel cigarettes and that he had relied upon representations in particular newspaper, television, and radio advertisements stating that Camel cigarettes were healthy and harmless.¹³ R.J. Reyn-

8. See Complaint, *State v. Philip Morris, Inc.*, No. 96122017/CL 211487 (Md., Baltimore City Cir. Ct.) (filed May 1, 1996).

9. See *State Tobacco Information Center* (visited Sept. 16, 1997) <<http://stic.neu.edu>>. The following thirty-eight states have also filed suits to recover Medicaid expenses: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin. See *id.* Puerto Rico has also filed suit. See *id.*

10. See Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 856 (1992). Early findings were first published in *The Journal of the American Medical Association* and later in *The Reader's Digest*. See *id.*

11. See, e.g., Rabin, *supra* note 10, at 854. The phrase "three waves" refers to the more active periods of litigation as follows: (1) 1954 to about 1965, (2) 1983 through 1992, and (3) 1992 to the present. See Elsa F. Kramer, *Tobacco Defense Strategies*, RES GESTAE, May 1996, at 24.

12. See *Cooper v. R.J. Reynolds Tobacco Co.*, 256 F.2d 464, 465 (1st Cir. 1958).

13. See, e.g., *id.* at 466. The alleged representations included that "20,000 doctors

olds, the manufacturer of Camel cigarettes, easily defeated this theory of deceit¹⁴ by asking Cooper which particular ads were relied on and showing the court that none of those ads included the alleged misrepresentations.¹⁵

This result was typical of the first wave cases. During this early period, only about 150 cases were filed¹⁶ based on various theories, including deceit,¹⁷ breach of warranty,¹⁸ and negligence.¹⁹ Only ten of these cases went to trial, and every plaintiff was ultimately defeated.²⁰

In *Lartigue v. R.J. Reynolds*,²¹ Frank Lartigue's widow filed suit against a group of cigarette makers, alleging breach of warranty and negligence.²² Lartigue died of lung cancer after fifty-five years of smoking the defendant's cigarettes.²³ Lartigue's widow alleged a causal connection between his smoking and his cancer.²⁴ However, the jury did not agree and sided with the tobacco companies.²⁵

Lartigue's widow appealed the jury instructions on the nature of the implied warranty of wholesomeness.²⁶ The trial judge explained that "such implied warranty does not cover substances in the manufactured products, *the harmful effects of which no developed human skill or foresight can [avoid]*."²⁷ According to these instructions, if the jury found that the tobacco companies did not foresee that cigarettes could cause cancer at the time that Mr. Lartigue's cancer began to develop, the verdict had to be in favor of the companies.²⁸ The United States Court of Appeals for the Fifth Circuit held that

say that 'Camel' cigarettes are healthful" and that they "are harmless to the respiratory system." *Id.*

14. *See id.* at 465.

15. *See id.* at 466.

16. *See* Kramer, *supra* note 11, at 24; Rabin, *supra* note 10, at 857.

17. *See, e.g., Cooper*, 256 F.2d at 465; *see also supra* text accompanying notes 13-16.

18. *See* Rabin, *supra* note 10, at 859; *see also infra* text accompanying notes 21-27.

19. *See* Rabin, *supra* note 10, at 859.

20. *See B&W Loses First Tobacco Liability Case in Fla.*, SELECT FEDERAL FILINGS NEW-SWIREs, Aug. 9, 1996, available in WL Fed File, HTH News [hereinafter B&W].

21. 317 F.2d 19 (5th Cir. 1963).

22. *See id.* at 22.

23. *See id.* Lartigue started smoking Picayune cigarettes, made by Liggett, as a nine-year-old child; as he got older, Lartigue also smoked Liggett's King Bee tobacco and R.J. Reynold's Camel cigarettes. *See id.*

24. *See id.* at 23.

25. *See id.* at 22.

26. *See id.*

27. *Id.* at 39 (alteration in original).

28. *See id.*

this instruction was fair and consistent with Louisiana law.²⁹ The court of appeals noted that those who started smoking before the "great cancer-smoking debate" could not claim reliance on representations that cigarettes had no carcinogenic element.³⁰

Similar jury instructions were upheld in *Ross v. Philip Morris & Co.*³¹ In *Ross*, the plaintiff attempted to recover for his injuries³² by asserting breach of implied warranty, negligence, fraud, and deceit against cigarette manufacturer Philip Morris.³³ In addition to a general denial, Philip Morris asserted as defenses the statute of limitations, assumption of risk, and contributory negligence.³⁴ At trial, the jury found for Phillip Morris.³⁵

On appeal, the plaintiff challenged the sufficiency of the jury instructions, arguing that Phillip Morris owed an absolute duty of wholesomeness, thereby making knowledge and reasonableness irrelevant.³⁶ The United States Court of Appeals for the Eighth Circuit acknowledged that strict liability could be imposed under certain conditions.³⁷ However, under the facts of this case, liability had been properly limited.³⁸ As the court of appeals explained, absolute liability emphasizes that only the manufacturer can know about a product's contents.³⁹ However, when Ross began smoking,⁴⁰ Philip Morris was in no better position than consumers to know of the link between cancer and smoking.⁴¹

In *Green v. American Tobacco Co.*,⁴² plaintiffs came closest to victory during the first wave of tobacco litigation.⁴³ In *Green*, a jury

29. *See id.*

30. *Id.* at 39-40.

31. 328 F.2d 3 (8th Cir. 1964).

32. For nearly twenty years, Ross smoked Phillip Morris's cigarettes, sometimes up to four packages a day, until undergoing surgery for throat cancer. *See id.* at 5. Ross underwent a laryngectomy, neck dissection, and tracheotomy. *See id.*

33. *See id.* The fraud and deceit count was not submitted to the jury because Phillip Morris's motion for summary judgment on that issue was granted. *See id.*

34. *See id.* The statute of limitations defense was eliminated in a pretrial conference. *See id.* Also, the assumption of risk and contributory negligence defenses did not go to the jury. *See id.*

35. *See id.* at 4-5.

36. *See id.* at 8.

37. *See id.*

38. *See id.*

39. *See id.*

40. In 1934, Ross began smoking only the defendant's cigarettes. *See id.*

41. *See id.*

42. 409 F.2d 1166 (5th Cir. 1969) (en banc).

43. *See Rabin, supra* note 10, at 861.

found that Edwin Green, Sr. died of lung cancer caused from smoking Lucky Strike cigarettes.⁴⁴ However, this case spanned more than a decade and reached appellate courts five times before the applicable state law could be determined. At the center of the controversy was the implied warranty of reasonable fitness and the applicability of strict liability. Although the plaintiff established causation,⁴⁵ the jury ultimately found for the tobacco company.⁴⁶ The tobacco company's victory was partially due to the jury instructions⁴⁷ which provided, like those in *Lartigue*⁴⁸ and *Ross*,⁴⁹ that the implied warranty does not cover substances the company could not foresee as harmful.⁵⁰

On certified question from the United States Court of Appeals for the Fifth Circuit, the Florida Supreme Court addressed the issue of the implied warranty of merchantability.⁵¹ The supreme court found that the manufacturer's "actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant."⁵² Without concluding on the particular facts of the case, the court held that there was no foreseeability limitation on liability under an implied warranty of merchantability.⁵³ The court also found that American Tobacco could be found absolutely liable for breach of implied warranty of fitness of cigarettes, which caused cancer in the plaintiff, even though the company did not or could not know of the potential harm.⁵⁴

The plaintiff's success on certification was short-lived, however, because the United States Court of Appeals for the Fifth Circuit reversed one of its prior *Green* decisions *en banc*.⁵⁵ Relying on the reasoning of an earlier dissent,⁵⁶ the court held that an implied war-

44. See *Green*, 409 F.2d at 1167 (Coleman, J., dissenting).

45. See *id.* (Coleman, J., dissenting).

46. See *Green v. American Tobacco Co.*, 154 So. 2d 169, 170 (Fla. 1963).

47. See *id.* at 170. The trial judge instructed the jury that an "implied warranty does not cover substances in the manufactured product the harmful effect of which no developed human skill or foresight can afford knowledge." *Id.*

48. See *supra* text accompanying notes 21-29.

49. See *supra* text accompanying notes 31-41.

50. See *Green*, 154 So. 2d at 170.

51. See *id.*

52. *Id.* at 170.

53. See *id.* at 172.

54. See *id.*

55. See *Green v. American Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969).

56. See *id.* at 1166 (Simpson, J., dissenting) (citing *Green v. American Tobacco Co.*, 391 F.2d 97, 106 (5th Cir. 1968)).

warranty guarantees that a product is "reasonably wholesome or fit."⁵⁷ Because the product in this case, Lucky Strike cigarettes, was not defective or adulterated,⁵⁸ the appellate court held that the manufacturer could not be liable.⁵⁹

In addition to issues of implied warranty, first wave juries also addressed plaintiffs' claims of express warranty. In *Pritchard v. Liggett & Myers Tobacco Co.*,⁶⁰ the jury found that Otto Pritchard's cancer was caused by smoking cigarettes manufactured by Liggett & Myers Tobacco Co. (Liggett). Nonetheless, the United States Court of Appeals for the Third Circuit held Liggett was not liable because it had not made any "express warranties upon which the plaintiff relied and by which he was induced to purchase" the cigarettes."⁶¹

Pritchard, like many others, also used a negligence theory against Liggett.⁶² The complaint included allegations that Liggett represented its cigarettes as safe when they actually contained harmful ingredients that made them unsafe for human consumption.⁶³ Pritchard contended that because Liggett knew, or should have known, that substances in the product were cancer-producing, it was negligent in failing to warn consumers of the potential harms of smoking.⁶⁴

Liggett argued that at the time Pritchard contracted cancer there was no evidence supporting the theory that smoking caused lung cancer.⁶⁵ This debate over the causal link between smoking and cancer never went to the jury.⁶⁶ The district court granted Liggett's motion for a directed verdict, holding that "no substantial evi-

57. *Green*, 391 F.2d at 113.

58. *See id.* at 111.

There has never been presented by the evidence any contention that Lucky Strike cigarettes were more dangerous or had a greater propensity to cause lung cancer than cigarettes bearing other brand names. Nor has there been any contention that the cigarettes which Mr. Green smoked contained any foreign substance, or any spoiled, contaminated or other substandard ingredient which caused his injury and death.

Green v. American Tobacco Co., 325 F.2d 673, 676 (5th Cir. 1963).

59. *See Green*, 391 F.2d at 111.

60. 370 F.2d 95 (3d Cir. 1966).

61. *Id.*

62. *See id.*; *see also* *Ross v. Philip Morris*, 328 F.2d 3, 13 (8th Cir. 1964).

63. *See Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 294 (3d Cir. 1961).

64. *See id.* at 299.

65. *See id.*

66. *See id.* at 295.

dence ha[d] been offered to support a verdict against the defendant on any theory of negligence."⁶⁷

On appeal, however, the United States Court of Appeals for the Third Circuit held that the evidence presented a jury question.⁶⁸ Thus, the issue of whether it was reasonable for Liggett to have forgone further testing⁶⁹ on the effects of smoking, and whether Liggett should have warned of cancer-causing ingredients, should have been submitted to the jury.⁷⁰ On retrial, the jury decided in favor of Liggett.⁷¹ Liggett successfully persuaded the jury that Pritchard "had assumed the risk of contracting lung cancer."⁷²

Tobacco companies had traditionally defended smokers' suits by simply denying all claims made by the plaintiffs and asserting the statute of limitations. Consistently, tobacco companies had argued cigarettes did not cause cancer or, alternatively, that they did not *know* that cigarettes could cause cancer.⁷³ As noted above, in *Lartigue*, R.J. Reynolds denied any causal connection between smoking and cancer.⁷⁴ In *Ross*, Philip Morris claimed that as a matter of law, there was insufficient evidence to submit the question of causation to the jury.⁷⁵ Nevertheless, Philip Morris did not challenge the jury instructions which stated that even if the cigarettes caused cancer, the defendants could not be held liable unless "reasonableness" and "developed skill or foresight" could have anticipated the harm.⁷⁶

Note that during this first wave of cases the central doctrine was not causation, but rather foreseeability.⁷⁷ Although juries found that the deaths at issue were due to cancer caused by smoking the manufacturer's cigarettes, they generally decided in favor of the

67. *Id.*

68. *See id.* at 300.

69. Evidence existed that Liggett had conducted one test on the effects of smoking on human beings, concluding that their cigarettes had no harmful effect on "nose, throat and accessory organs." *Id.* at 300. However, a doctor who examined study participants did note harmful effects from smoking. *See id.*

70. *See id.*

71. *See Rabin, supra* note 10, at 862.

72. *Id.*

73. *See Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 23 (5th Cir. 1963); *Ross v. Philip Morris & Co.*, 328 F.2d 3, 10 (8th Cir. 1964); *Green v. American Tobacco Co.*, 409 F.2d 1166, 1169 (5th Cir. 1969).

74. *See Lartigue*, 317 F.2d at 23.

75. *See Ross*, 328 F.2d at 7.

76. *Id.* at 6-7.

77. *See Rabin, supra* note 10, at 860-61.

manufacturers based on the lack of foreseeability of harm to the plaintiffs.⁷⁸ During this time, juries determined that the requisite human skill and knowledge were not sufficiently developed to provide the insight that smokers could and did contract cancer from smoking.⁷⁹

The conclusions reached by judges and juries during the first wave illustrate the general lack of understanding regarding the health risks associated with smoking. The great cancer-smoking debate was only in its early stages and it was believed that smokers merely assumed the risk of harm.⁸⁰ In addition, the general public widely accepted the notion that tobacco companies lacked the knowledge that their products caused lung cancer.⁸¹

Little was it known that not only did tobacco companies have the knowledge that plaintiffs like Pritchard had alleged,⁸² but that they took active measures to conceal their findings from the public. Recent evidence has shown that tobacco company executives, by denying that evidence proved a connection between smoking and cancer, created the atmosphere within which these earlier cases were heard and lost by plaintiffs.⁸³ What subsequent plaintiffs learned from these early defeats was that they would have to produce evidence that the tobacco companies had knowledge of the harmful effects and concealed it.

B. Second Wave: 1980s

The second wave of tobacco litigation began in the 1980s,⁸⁴ a period in which more information linking smoking to cancer became available.⁸⁵ Even though another 150 cases were filed, plaintiffs remained unsuccessful.⁸⁶ Plaintiffs continued to assert many of the same theories as in the first wave of litigation, such as breach of warranty. However, they also undertook a new focus with other theories.

78. See *Pritchard v. Liggett & Myers Tobacco Co.*, 370 F.2d 95 (3d Cir. 1966); see also *supra* text accompanying notes 32-34, 39-46; *Green*, 409 F.2d at 1167.

79. See *Lartigue*, 317 F.2d at 19; *Green*, 409 F.2d at 1166.

80. See *supra* text accompanying notes 29-30, 72.

81. See *supra* text accompanying notes 28, 40-41.

82. See *supra* text accompanying notes 62-64.

83. See *infra* text accompanying notes 215-16, 227-44.

84. See *B&W*, *supra* note 20; *Kramer*, *supra* note 11, at 24.

85. See *Rabin*, *supra* note 10, at 864. The Surgeon General's Report of 1964 was released, and legislation requiring warning labels on cigarette packages was enacted. See *id.*

86. See *Kramer*, *supra* note 11, at 24.

In *Roysdon v. R.J. Reynolds*,⁸⁷ the plaintiffs contended that R.J. Reynolds's cigarettes were defective and unreasonably dangerous.⁸⁸ During the first wave of cases tobacco companies defeated this theory by convincing the fact finder that the harm caused from smoking was not foreseeable.⁸⁹ Now, however, tobacco companies combined the foreseeability doctrine with the consumers' increased level of knowledge to avoid liability.⁹⁰

In *Roysdon*, the court explained that under Tennessee law, a defective product was one that is "unsafe for normal or anticipatable handling and consumption."⁹¹ Therefore, consumer knowledge about the inherent risks of smoking must be considered when determining whether cigarettes are defective.⁹² At trial, the Roysdons did not argue that the cigarettes were incorrectly manufactured or had dangerous impurities.⁹³ Thus, the court found that R.J. Reynolds's cigarettes did not pose any risks that were not already known by consumers.⁹⁴ Therefore, the product could not be defective.⁹⁵

Regarding the Roysdon's claim that R.J. Reynold's cigarettes were "unreasonably dangerous," the court again found that public knowledge about the risks and dangers of smoking prevented a finding in favor of the Roysdons.⁹⁶ Under Tennessee law,⁹⁷ a product is "unreasonably dangerous" if it is more dangerous than an ordinary consumer with common knowledge would think it to be.⁹⁸ The court found that knowledge that "smoking is harmful to health is widespread and can be considered part of common knowledge."⁹⁹ Thus, because the information was available to the Roysdons, the court held the issue could not go to the jury.¹⁰⁰ *Roysdon* illustrates a shift in the use of strict liability by plaintiffs. Rather than focusing on foreseeability, as was done in the first wave of cases, plaintiffs re-

87. 849 F.2d 230 (6th Cir. 1988).

88. *See id.* at 232.

89. *See supra* text accompanying notes 55-59 for a discussion of *Green*.

90. *See infra* text accompanying notes 91-100 for a discussion of *Roysdon*.

91. *Roysdon*, 849 F.2d at 236.

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *See Id.*

97. TENN. CODE ANN. § 29-28-102(8) (1980), *cited in Roysdon*, 849 F.2d at 236.

98. *See Roysdon*, 849 F.2d at 236.

99. *Id.* (quoting *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1192 (E.D. Tenn. 1985)).

100. *See id.*

lied on the dangerous nature of the product.¹⁰¹ While the unsuccessful plaintiffs in *Roysdon* used the "unreasonably dangerous" method, others tried to persuade courts to apply the risk-utility test.¹⁰²

In *Gianitsis v. American Brands, Inc.*,¹⁰³ Nickolas Gianitsis brought suit against several tobacco companies claiming that he contracted lung cancer as a result of smoking the defendant's cigarettes.¹⁰⁴ He attacked the tobacco industry with the risk-utility test¹⁰⁵ which had been proposed fifteen years earlier in an article by Professor Wade.¹⁰⁶ Under this doctrine, a manufacturer could be liable for injuries if the product's risks outweigh its social value or usefulness.¹⁰⁷ Thus, a plaintiff could maintain a strict liability claim without having to prove a defect in the product.¹⁰⁸ However, the *Gianitsis* court did not accept the "expansive doctrine of strict product liability."¹⁰⁹ Although the court found that the plaintiff's claim was consistent with the risk-utility theory,¹¹⁰ it held that such theory was not recognized under New Hampshire law.¹¹¹

A similar result occurred in *Miller v. Brown & Williamson Tobacco Corp.*,¹¹² where the court declined to apply the risk-utility test.¹¹³ The *Miller* court noted that although the Pennsylvania Supreme Court mentioned the risk-utility test in a prior case,¹¹⁴ it did not intend to

101. See Rabin, *supra* note 10, at 866.

102. See *infra* text accompanying notes 105-08 for a discussion of the risk-utility test.

103. 685 F. Supp. 853 (D.N.H. 1988) (applying New Hampshire law).

104. See *id.*

105. See *id.* at 855.

106. See *id.* at 857. Wade proposed that whether a product is defective is more properly an issue of negligence, while whether a product is unreasonably dangerous is a products liability issue. See J. W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837 (1973).

107. See *Gianitsis*, 685 F. Supp. at 857 (discussing *Cipollone v. Liggett Group*, 649 F. Supp. 664, 670-71 (D.N.J. 1986)) (citing *O'Brien v. Muskin Corp.*, 462 A.2d 298 (N.J. 1983)).

108. See *id.*

109. *Id.* at 859.

110. See *id.* at 857.

111. See *id.* at 859. The court found that New Hampshire courts have adopted the RESTATEMENT (SECOND) OF TORTS, which the court interpreted as requiring an allegation of a defect. See *Gianitsis*, 685 F. Supp. at 858.

112. 679 F. Supp. 485 (E.D. Pa. 1988).

113. See *id.* at 489.

114. See *id.*; see also *Lewis v. Coffing Hoist Div.*, 528 A.2d 590 (Pa. 1987). The *Lewis* court mentioned three approaches to design defects as follows: (1) the con-

adopt this approach and would not do so now.¹¹⁵

During the second wave of cases, the tobacco industry continued to deny that cigarettes were hazardous¹¹⁶ and asserted the "freedom of choice" argument.¹¹⁷ Ironically, the tobacco companies used the Federal Cigarette Labeling and Advertising Act of 1965, as amended by the Public Health Cigarette Smoking Act of 1969, (the Cigarette Acts)¹¹⁸ to strengthen this defense, as well as advance pre-emption arguments.¹¹⁹

In *Brisboy v. Fibreboard Corp.*,¹²⁰ the Supreme Court of Michigan, while addressing contributory negligence in an asbestos case, acknowledged that consumers have the freedom to choose, and they therefore assume the risks resulting from their choices.¹²¹ In *Brisboy*, the decedent was an asbestos worker who smoked two packs of cigarettes a day for thirty years and died of lung cancer.¹²² The jury found that the decedent's exposure to asbestos, as well as his smoking, concurrently caused his fatal cancer.¹²³ The court held that the "risk of developing lung cancer is within the scope of the risk as-

sumer expectations standard; (2) the risk-utility standard; and (3) the *Azzarello* standard. See *Lewis*, 528 A.2d at 593; see also *Miller*, 679 F. Supp. at 487. Under the consumer expectation standard, a product may be defective if it does not perform as an ordinary consumer would expect during normal use. See *Miller*, 679 F.Supp. at 487. The risk-utility test provides that a product is defective if the risk of harm outweighs the benefits of the characteristic at issue. See *id.* The *Azzarello* standard may result in a finding of defectiveness if the product leaves the manufacturer's control without any feature that makes it safe for its intended use or with any feature that makes it unsafe for its intended use. See *id.*

115. See *Miller*, 679 F. Supp. at 489.

116. See Curriden, *supra* note 1, at 60.

117. *Id.*; Kramer, *supra* note 11, at 24; see Rabin, *supra* note 10, at 870; see also *id.* at 873 (explaining that the tobacco companies place responsibility for harm on the user, instead of the industry, while still denying risk to the user).

118. See Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-40 (1994)). Four years later, Congress amended the 1965 Act by enacting the Public Health Cigarette Smoking Act of 1969. See Pub. L. No. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331-40 (1994)). The 1969 amendments strengthened the warning label language and prohibited advertising in any medium under FCC regulation. See *id.*; see also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 515 (1992) (explaining the 1969 amendments).

119. See Curriden, *supra* note 1, at 60.

120. 418 N.W.2d 650 (Mich. 1988).

121. See *id.* at 655.

122. See *id.* at 651.

123. See *id.* at 655.

sumed by a smoker."¹²⁴ Thus, the decedent's smoking habit constituted negligence.¹²⁵ Under the doctrine of comparative negligence, the defendant, an asbestos manufacturer, would only be liable for damages causally related to its own negligence.¹²⁶

While analyzing the Cigarette Acts, the court in *Forster v. R.J. Reynolds Tobacco Co.*¹²⁷ noted that Congress warned people that "they should not smoke if they value their health but [left] the decision whether to smoke up to them."¹²⁸ R.J. Reynolds argued that the Cigarette Acts preempted not only¹²⁹ Forster's failure to warn claim, but also any state claim based on defective condition or design.¹³⁰ R.J. Reynolds further argued that permitting such state tort actions would conflict with the Cigarette Acts' compromise,¹³¹ which allows cigarettes to be sold if they are packaged with the federally-mandated warning label.¹³² The *Forster* court held that the Cigarette Acts impliedly preempted state tort claims based on the duty to warn,¹³³ but did not preempt other claims to the extent that they were not based on the duty to warn.¹³⁴

In *Hite v. R.J. Reynolds Tobacco Co.*,¹³⁵ the Superior Court of Pennsylvania also concluded that the Cigarette Acts preempted post-1965 claims¹³⁶ based on the failure to warn.¹³⁷ Much of the court's

124. *Id.*

125. *See id.*

126. *See id.* at 655-57.

127. 437 N.W.2d 655 (Minn. 1989).

128. *Id.* at 658.

129. Under the Supremacy Clause, U.S. CONST. art. VI, Congress can preempt state common law and statutes with federal legislation. *See, e.g., Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1243 (N.J. 1990). State law preemption can occur by express language, implied congressional intent, or to the extent that state law conflicts with the federal regulation. *See id.* Instances of conflict preemption include (1) where compliance with both state and federal laws would be physically impossible and (2) where state law is an obstacle to the purposes of a federal regulation. *See id.*

130. *See Forster*, 437 N.W.2d at 659.

131. The *Forster* court interpreted the Cigarette Acts to represent a "compromise between the national interest in protecting health by not smoking and the national interest in protecting commerce and the country's tobacco economy." *Id.* at 658.

132. *Id.* at 660.

133. *See id.*

134. *See id.* at 661-63. Thus, Forster's claims of unsafe design, misrepresentation, and breach of warranty were not preempted. *See id.*

135. 578 A.2d 417 (Pa. Super. 1990).

136. "The Act does not specifically provide for retroactive preemptive effect." *For-*

reasoning came from its analysis of the decision rendered by the Court of Appeals for the Third Circuit in *Cipollone v. Liggett Group, Inc.*¹³⁸ The *Hite* court agreed with the *Cipollone* court's conclusion that state tort claims alleging violations of warning obligations, other than those required by the federal act, would conflict with the Cigarette Acts and disturb the balance created by Congress.¹³⁹

Although several courts effectively precluded plaintiffs' claims by allowing the preemption defense,¹⁴⁰ not all courts accepted this defense. The court in *Dewey v. R.J. Reynold's Tobacco Co.*¹⁴¹ chose to conduct its own analysis of the issue¹⁴² rather than relying on previous interpretations. The *Dewey* court concluded that the Cigarette Acts did not preempt the plaintiff's claims.¹⁴³

The *Dewey* court acknowledged that many federal circuit courts approved of the rationale in *Cipollone*, but noted that some of those decisions were reversals of lower courts that had determined that the Cigarette Acts were not preemptive.¹⁴⁴ The *Dewey* court concluded that the Cigarette Acts do not expressly, impliedly, or by "actual conflict" preempt state law claims.¹⁴⁵ The court found that the goals of the Cigarette Acts were to (1) inform the public that smoking may be dangerous to one's health by requiring warning labels and (2) protect commerce and the economy.¹⁴⁶ The court rejected

ster, 437 N.W.2d at 663.

137. See *Hite*, 578 A.2d at 420.

138. 789 F.2d 181 (3d Cir. 1986).

139. See *Hite*, 578 A.2d at 419-20.

140. See *supra* text accompanying notes 129-34 for a discussion of *Forster*. See *supra* text accompanying notes 135-39 for a discussion of *Hite*.

141. 577 A.2d 1239 (N.J. 1990).

142. See *id.* at 1244.

143. See *id.* at 1251.

144. See *id.* at 1246. See generally, e.g., *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 696-701 (1988), *rev'd*, 437 N.W.2d 655 (Minn. 1989) (finding that the Cigarette Acts did not "immunize the tobacco industry from tort liability," and citing four factors as follows: (1) the Cigarette Acts do not explicitly preempt state court claims, (2) state police powers are involved, (3) the legislative history of the Cigarette Acts shows that Congress did not intend to preempt, and (4) preemption would destroy all methods of recourse for plaintiffs).

145. See *Dewey*, 577 A.2d at 1247.

146. See *id.* at 1248. The statement of policy and purpose explains:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health whereby—(1) The public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a

R.J. Reynold's argument that because state tort claims frustrate the second goal, such an "obstacle" is preempted.¹⁴⁷ Instead, the court observed that permitting such claims would advance the public policy goals of providing individuals with the opportunity to present claims and receive compensation where appropriate.¹⁴⁸

III. TOBACCO LITIGATION TODAY

A. *Third Wave: 1992 to Present*

The split on the preemptive effect of the Cigarette Acts¹⁴⁹ was addressed by the United States Supreme Court in *Cipollone v. Liggett Group, Inc.*¹⁵⁰ which marked the beginning of the current, third wave of tobacco litigation.¹⁵¹ Rose Cipollone started smoking in 1942 and died of lung cancer in 1984.¹⁵² Her son brought suit against Liggett, alleging breach of express warranties, failure to warn, fraudulent misrepresentation, and conspiracy.¹⁵³ Liggett contended that the Cigarette Acts, the Federal Cigarette Labeling and Advertising Act of 1965 (the 1965 Act) and the Public Health Cigarette Smoking Act of 1969 (the 1969 Act), preempted such claims, thus safeguarding it from liability.¹⁵⁴

Prior to *Cipollone*, the United States Court of Appeals for the Third Circuit ruled that the 1965 Act preempted most actions against tobacco manufacturers after 1965.¹⁵⁵ However, as noted by the Supreme Court, the court of appeals did not specify which of

warning to that effect on each package of cigarettes; and (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (1982).

147. See *Dewey*, 577 A.2d at 1248.

148. See *id.* at 1249-50.

149. See *supra* note 118 (explaining origins of the Cigarette Acts).

150. 505 U.S. 504 (1992).

151. See generally Rabin, *supra* note 10, at 874.

152. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508 (1992). Rose Cipollone and her husband filed suit on August 1, 1983. See *id.* at 509. When she died in 1984, her husband continued the claim until his death after the trial. See *id.* Their son maintained the Supreme Court action. See *id.*

153. See *id.* at 508.

154. See *id.* at 510. See generally *supra* note 118 (explaining origins of the Cigarette Acts).

155. See *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986).

Cipollone's claims were preempted.¹⁵⁶ On remand, the district court complied with the appellate court ruling and prohibited Cipollone from relying on Liggett's advertising and public relations conduct in proving his failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud claims.¹⁵⁷ However, even with these limitations, Liggett prevailed at trial. The jury concluded that Liggett breached its duty to warn and express warranties before 1966, and thus the jury awarded Cipollone \$400,000 in damages.¹⁵⁸ On appeal, however, the trial court's decision was reversed, and a new trial was ordered.¹⁵⁹ Thereafter, the Supreme Court granted certiorari to address the preemption issues regarding the 1965 and 1969 Acts.¹⁶⁰

The Supreme Court issued three distinct holdings. First, the Court held that state law damage actions were not preempted by Section 5 of the 1965 Act.¹⁶¹ Second, the Court determined that the 1969 Act preempted Cipollone's failure to warn claim.¹⁶² Third, the Court held that claims based on express warranty, intentional fraud and misrepresentation, or conspiracy were not preempted by the 1969 Act.¹⁶³ In reaching these conclusions, the majority¹⁶⁴ relied on a narrow rule of statutory interpretation.¹⁶⁵ The Court looked only

156. See *Cipollone*, 505 U.S. at 512.

157. See *Cipollone v. Liggett Group, Inc.*, 649 F. Supp 664, 673-75 (D.N.J. 1986).

158. See *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 554-55 (3d Cir. 1990), *aff'd in part*, 505 U.S. 504 (1992). The jury found Rose Cipollone 80% responsible for her injuries because she voluntarily smoked cigarettes, which was a known danger. See *id.*

159. See *id.* at 583.

160. See *Cipollone*, 505 U.S. at 512.

161. See *id.* at 519-20. However, state and federal rulemaking bodies were preempted from "mandating particular cautionary statements." *Id.* at 520.

162. See *id.* at 524 ("Petitioner's claims are preempted to the extent that they rely on a state-law 'requirement or prohibition . . . with respect to . . . advertising or promotion.'"). Claims based on Liggett's testing or research, however, were held not to be preempted. See *id.* at 524-25.

163. See *id.* at 531.

164. Justice Stevens wrote the majority opinion for Parts I, II, III, and IV in which he was joined by Chief Justice Rehnquist, Justice O'Connor, Justice Blackmun, Justice Kennedy, Justice Souter, and Justice White. See *id.* at 507. Justice Stevens also wrote a plurality opinion for Parts V and VII, in which Chief Justice Rehnquist, Justice O'Connor, and Justice White joined. See *id.*

165. See *id.* at 517. The Court relied on the principle of "expressio unius est exclusio alterius." *Id.* In statutory interpretation, this means that "Congress[ional] enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.*; see also

to the express language of the acts¹⁶⁶ "in light of the presumption against preemption."¹⁶⁷

In a dissent, Justice Blackmun, joined by Justices Kennedy and Souter, stated that he believed the preemption language could not be interpreted in isolation, but must be read in the context of the whole statute.¹⁶⁸ Dissenting in part, he turned to the legislative history¹⁶⁹ and determined that Congress did not intend "to leave plaintiffs who were injured as a result of cigarette manufacturers' unlawful conduct without any alternative remedies."¹⁷⁰ Therefore, Justice Blackmun would have held that none of the common-law remedies was preempted by the 1969 Act.¹⁷¹

In a second dissenting opinion Justice Scalia, joined by Justice Thomas concluded that *all* of Cipollone's common-law claims were preempted.¹⁷² Justice Scalia explained that the Court erred in applying a narrow rule of construction to the preemption provisions.¹⁷³ Instead, the proper rule of construction required that the statutory language be given its "ordinary meaning."¹⁷⁴

Cipollone illustrates the progress made by plaintiffs over the past two waves of litigation. In *Cipollone*, the plaintiff was able to fight for over ten years, taking the industry to the Supreme Court with numerous claims, at a cost of \$6.2 million dollars.¹⁷⁵ During the first period, most cases were brought by "frontiersmen," lone personal injury lawyers¹⁷⁶ who were often ill-prepared and at times found to be incompetent.¹⁷⁷ These early battles taught plaintiffs that resources needed to be pooled and new theories espoused.¹⁷⁸

George J. Annas, *Health Warnings, Smoking, and Cancer—The Cipollone Case*, 327 NEW ENG. J. MED. 1604, 1605 (1992) (explaining the Court's majority and concurring opinions).

166. See *Cipollone*, 505 U.S. at 517.

167. *Id.* at 518.

168. See *id.* at 535 (Blackmun, J., dissenting in part).

169. See *id.* at 539-41 (Blackmun, J., dissenting in part).

170. *Id.* at 541 (Blackmun, J., dissenting in part).

171. See *id.* at 542 (Blackmun, J., dissenting in part).

172. See *id.* at 548 (Scalia, J., dissenting in part).

173. See *id.* at 545-46 (Scalia, J., dissenting in part).

174. *Id.* at 548 (Scalia, J., dissenting in part).

175. See Curriden, *supra* note 1, at 59.

176. See Rabin, *supra* note 10, at 857.

177. See *id.* at 860.

178. See Curriden, *supra* note 1, at 60.

1. Class and State Actions

The pooling of resources is now a more widespread practice. By combining resources, plaintiffs are now in a better position to handle the demands placed on them by tobacco company attorneys.¹⁷⁹

On March 29, 1993, *Castano v. The American Tobacco Co.*¹⁸⁰ was filed.¹⁸¹ This class action suit was filed on behalf of all nicotine dependent people in the United States.¹⁸² The broadly defined class, which potentially included over forty million people,¹⁸³ was represented by a team of over sixty law firms.¹⁸⁴ The Court of Appeals for the Fifth Circuit noted that "the gravamen of their complaint is . . . [a] novel and wholly untested theory"¹⁸⁵ based upon new evidence.¹⁸⁶ The plaintiffs alleged that the tobacco companies knew that nicotine was addictive, and that the tobacco companies not only failed to inform consumers, but manipulated nicotine levels with the intent of increasing the addictive nature of their product.¹⁸⁷ This general theory was the central theme throughout the causes of actions asserted—fraud and deceit, negligent misrepresentation, intentional infliction of emotional distress, breach of warranty, and strict product liability.¹⁸⁸

179. The tobacco industry is notorious for hiring several highly skilled attorneys for each case, never settling a claim, and creating a mountain of work for plaintiffs. *See id.* at 59.

180. 160 F.R.D. 544 (E.D. La. 1995).

181. *See id.* at 548. In May 1996, the class was decertified. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996). The court of appeals found that the district court failed to consider the effects of variations in state law and how such a trial would be conducted. *See id.* at 740.

182. *See Castano*, 160 F.R.D. at 549. The district court defined the class as:

(a) All nicotine-dependent persons in the United States, its territories, possessions and the Commonwealth of Puerto Rico, who have purchased and smoked cigarettes manufactured by the defendants; (b) the estates, representatives, and administrators of these nicotine-dependent cigarette smokers; and, (c) the spouses, children, relatives and "significant others" of these nicotine-dependent cigarette smokers as their heirs or survivors.

Id. at 560-61.

183. *See Kramer*, *supra* note 11, at 24.

184. *See* George J. Annas, *Tobacco Litigation As Cancer Prevention: Dealing with the Devil*, 336 NEW ENG. J. MED. 304, 304 (1997).

185. *Castano*, 84 F.3d at 737.

186. *See id.* at 748.

187. *See Castano*, 160 F.R.D. at 548.

188. *See id.*

The first class action suit to go to trial, on June 1, 1997, significantly differs from past cases in that the injured parties are non-smokers.¹⁸⁹ The class is comprised of 60,000 non-smoking flight attendants who contend that exposure to second-hand smoke while working in airplane cabins has caused them to suffer from various illnesses.¹⁹⁰ The class is asking for \$5 billion in damages.¹⁹¹

The blameless nature of the non-smoking plaintiffs strips the tobacco industry of its "freedom-of-choice" defense.¹⁹² Instead, the defendant is expected to argue that other contaminants could have caused the flight attendants' injuries.¹⁹³ The cigarette companies will also argue that the flight attendants' claims should be tried individually, rather than as a class, because of the numerous differences among the class members.¹⁹⁴

The presiding Florida circuit court judge, however, has decided to move forward with the trial as a class action.¹⁹⁵ A jury will first decide whether the industry can be responsible for the injuries suffered by the class.¹⁹⁶ If the industry is found liable, then the jury will evaluate individual claims.¹⁹⁷

On May 23, 1994, Mississippi was the first state to sue the tobacco industry in order to recover Medicaid funds that were spent treating smoking-related illnesses.¹⁹⁸ Since then, thirty-eight more states, including Maryland, have filed similar suits.¹⁹⁹ The plaintiffs now are represented by government attorneys working with experienced products liability lawyers in an effort to "establish for the first time that the tobacco companies have as much [of an] obligation to compensate the states for damages caused by their product

189. See Donald P. Baker, *Nonsmoker's Suit Presents New Challenge for Industry; Tobacco Makers Can't Use 'Freedom-of-Choice Defense'*, WASH. POST, May 31, 1997, at A3, available in 1997 WL 11585888.

190. See *id.* One named plaintiff, Norma R. Broin, was stricken with cancer which resulted in the removal of a lung. See *id.*

191. See *id.*

192. See *id.*; see *supra* text accompanying notes 117-26.

193. See Baker, *supra* note 189, at A3.

194. See *id.*; see also *infra* text accompanying note 202 (providing example of tobacco companies asserting the same argument in actions brought by states).

195. See Baker, *supra* note 189, at A3.

196. See *id.*

197. See *id.*

198. See *Ct. Hears Tobacco Challenge to Miss Atty Gen'l Suit*, SELECTED FEDERAL FILINGS NEWSWIRE, Sept. 4, 1996, available in WESTLAW, ALLNEWSPLUS database.

199. See *supra* note 9.

as an oil company has for the cost of cleaning up a spill.”²⁰⁰

Plaintiffs hope to achieve success by utilizing a theory of conspiracy. The states contend that since the early 1950s tobacco companies have known that cigarettes are hazardous to the health of smokers, but suppressed information about the dangers of nicotine and conspired to prevent the development of a safer cigarette.²⁰¹

Nonetheless, tobacco companies continue to be armed with several defenses. They contend that states should still be required to show evidence on an individual basis, as they would in a traditional personal injury case.²⁰² If the cases move forward, the tobacco companies have also threatened to depose thousands of Medicaid recipients.²⁰³ Tobacco companies also argue that states are not damaged because they have received millions of dollars from taxes on cigarettes.²⁰⁴ Some tobacco companies have even gone so far as to claim that they have actually saved the states money. Specifically, they have asserted that Medicaid and Social Security benefits no longer need to be provided to smokers due to their early deaths.²⁰⁵

a. Maryland State Action

On May 1, 1996, the State of Maryland filed suit against the tobacco industry seeking \$13 billion in damages.²⁰⁶ The State’s complaint sets forth thirteen counts, including fraud and deceit, breach of warranties, negligence, and strict liability.²⁰⁷ Like other state actions, Maryland is also utilizing a conspiracy count against the industry. Specifically, the State accuses the tobacco companies of entering into an agreement to suppress information on the dangers of smoking, including the addictive effects of nicotine, and preventing the marketing of a safer cigarette.²⁰⁸ In addition to these theories of liability, Maryland, in its sovereign capacity, also accuses the tobacco companies of violating state antitrust and consumer protection acts.²⁰⁹ These theories distinguish the State’s case from suits brought

200. Weinstein & Nelson, *supra* note 5, at A1.

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.*

206. *See* Complaint, *supra* note 8, *Phillip Morris*, (No. 96122017/CL 211487); *Federal Claims Asserted, Remand of Maryland Case Improper, Industry Says*, MEALEY’S LITIGATION REPORT: TOBACCO, July 18, 1996.

207. *See* Complaint, *supra* note 8, at 76-99, *Phillip Morris* (No. 96122017/CL 211487).

208. *See id.* at 80.

209. *See id.* at 13.

by individuals.

In the first count of its complaint, Maryland alleges that the tobacco companies violated Section 13-301 of the Maryland Consumer Protection Act.²¹⁰ Section 13-301 proscribes "any unfair or deceptive trade practice" with respect to the sale of consumer goods.²¹¹ The State contends that the tobacco companies continue to engage in "unfair or deceptive trade practices" in their sale and promotion of tobacco products.²¹² The illegal conduct alleged is five-fold: (1) misleading Maryland consumers about the industry's knowledge on the health effects of smoking; (2) making statements that cigarettes have a benefit that they do not; (3) misrepresenting their connection to the Tobacco Industry Research Committee/Council for Tobacco Research, claiming it was controlled by independent scientists when it was actually an industry promotional tool; (4) failing to state material facts concerning health hazards and the addictiveness of nicotine; and (5) promoting the sale of tobacco to minors.²¹³

The tobacco companies are also accused of violating Section 11-204 of the Maryland Consumer Protection Act in counts two, three, and four of the State's complaint.²¹⁴ The tobacco companies are accused of entering a "contract, combination and conspiracy" that resulted in the restraint of trade and commerce and willfully monopolizing the cigarette market.²¹⁵ The conspiracy is said to include the following: (1) an agreement to suppress independent smoking research; (2) the destruction of research results illustrating health hazards; (3) public relations campaigns intended to deceive the public; (4) a joint effort to make false statements to Congress; and (5) an agreement to stop the development of a "safer" ciga-

210. *See id.* at 76.

211. MD. CODE ANN., COM. LAW II § 13-303 (1990).

212. Complaint, *supra* note 8 at 76, *Phillip Morris* (No. 96122017/CL 211487).

213. *See id.* at 76-77.

214. *See id.* at 79-85.

215. *Id.* Specifically, the tobacco companies are accused of violating the Maryland Antitrust Act, MD. CODE ANN., COM. LAW II § 11-204(a)(1)-(2) (1990). The Maryland Antitrust Act provides:

(a) *Prohibited conduct.*—A person may not: (1) By contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce; (2) Monopolize, attempt to monopolize, or combine or conspire with one or more other persons to monopolize any part of the trade or commerce within the State, for the purpose of excluding competition or of controlling, fixing or maintaining prices in trade or commerce.

Id.

rette.²¹⁶ At the same time, the State contends suppression of information on the adverse health effects of smoking and development of a safer cigarette was an exercise of the tobacco companies' monopolistic power.²¹⁷ Maryland maintains that it has suffered great injury as a result of the industry's anti-trust violations, specifically, higher rates of illness and death and the costs associated with them.²¹⁸

Maryland and other states alleging antitrust violations and consumer fraud may prevail where plaintiffs invoking common-law remedies have failed. This point is illustrated by the trial court's recent decision on the tobacco companies' motion to dismiss. The only counts to survive were the consumer protection and antitrust claims.²¹⁹

As plaintiffs, states avoid the problems of a "blameworthy plaintiff"²²⁰ which individuals faced in many earlier suits, making it easier to focus on the misconduct of the tobacco companies.²²¹ As Minnesota Attorney General Hubert Humphrey, III explained upon filing Minnesota's action, "[P]revious lawsuits have said the tobacco companies should pay because their products are dangerous. This suit says they should pay because the conduct . . . is illegal."²²²

b. Minnesota Model

Because the Maryland case is still in its early stages, the parties should look to the State of Minnesota case²²³ for an indication of what lies ahead. Many view the Minnesota claim as a model because

216. See Complaint, *supra* note 8, at 80, *Phillip Morris* (No. 96122017/CL 211487).

217. See *id.* at 85.

218. See *id.* at 86.

219. See *State v. Philip Morris Inc.*, No. 96122017/CL 211487 (May 21, 1997). The court dismissed Maryland's common law counts, holding that the State has "no right . . . to assert claims *in its own name* against defendants as alleged tortfeasors for the harm defendants allegedly caused . . . to third party smokers." *Id.* at 11 (emphasis added). The court explained that under the doctrine of subrogation, the State would need to bring such claims in the name of each individual Medicaid recipient. See *id.*

220. Richard A. Daynard, *The Third Wave of Tobacco Products Liability Cases*, TRIAL, Nov. 1994, at 34, 37-39.

221. See *id.* at 39; see also *supra* note 215.

222. *State of Minnesota, Private Insurer Sue Tobacco Companies*, WASH. POST, Aug. 18, 1994, at A4, available in 1994 WL 2435397. Minnesota also asserted antitrust and consumer protection claims. See Complaint, *State v. Phillip Morris, Inc.*, No. C1-94-8565 (Minn., Ramsey County Dist. Ct.) (filed Aug. 17, 1994).

223. See Complaint, *supra* note 222, *Phillip Morris* (No. C1-94-8565).

it was filed early and is steadily moving forward.²²⁴ So far discovery has provided Minnesota with more than ten million pages of documents from the tobacco industry, as well as access to databases compiled by tobacco companies' law firms during the defense of prior suits.²²⁵ The tobacco companies seek a comparable volume of paperwork in requesting State Medicaid payment records and reports.²²⁶

2. New Evidence

Many of the newly-uncovered documents that states are relying upon are the result of relatively recent leaks by industry insiders. In 1994, thousands of pages of documents from Brown & Williamson surfaced.²²⁷ An anonymous source, known only as "Mr. Butts," provided Stanton A. Glantz, Ph.D, at the University of California at San Francisco, with approximately four thousand pages of information that spanned thirty years.²²⁸ Representative Henry Waxman, chairman of the House Subcommittee on Health and the Environment, also possessed many Brown & Williamson documents.²²⁹ In addition, the estate of a former British American Tobacco officer made other industry papers available.²³⁰

These valuable documents revealed that Brown & Williamson has known for over thirty years that nicotine is addictive and smoking can cause cancer.²³¹ Because tobacco companies' research on the health effects of smoking was often far ahead of the rest of the

224. See Weinstein & Nelson, *supra* note 5, at A1.

225. See *id.* These documents are thought to be copies of those taken by Merrell Williams, a former paralegal for one of Brown & Williamson's attorneys. See *id.*

226. See *id.*

227. See James S. Todd et al., *The Brown and Williamson Documents: Where Do We Go From Here?*, 274 JAMA 256, 256 (1995).

228. See *id.*

229. See *id.* Brown and Williamson tried to retrieve these documents from Representative Waxman by obtaining a subpoena from the Superior Court for the District of Columbia. See *id.* at 257. However, the subpoenas were later quashed by the United States District Court for the District of Columbia. See *Maddox v. Williams*, 855 F. Supp. 406, 414-15 (D.D.C. 1994). The judge explained that to accept Brown & Williamson's argument, that the papers were stolen and therefore should be returned, would go against the law, equity, and the public interest because the documents may be evidence of the tobacco company's deception. See Stanton A. Glantz et al., *Looking Through a Keyhole at the Tobacco Industry: The Brown and Williamson Documents*, 274 JAMA 219, 223 (1995).

230. See Todd et al., *supra* note 227, at 256.

231. See Glantz, *supra* note 229, at 219.

medical community, Brown & Williamson had advance knowledge of the hazards but decided to hide this information from the public.²³² Instead, Brown & Williamson and other tobacco companies chose to tell the public that a connection between smoking and illness had not yet been established.²³³ For example, in a 1963 memo, Brown & Williamson's general counsel, Addison Yeaman, stated, "We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms."²³⁴ Over three decades later, the Chairman and CEO of Brown & Williamson testified before the Health and Environment Subcommittee that nicotine is not addictive.²³⁵

In addition to documentation, some individuals have also come forward with potentially damaging information. Jeffrey Wigand, the former head of research and development at Brown & Williamson,²³⁶ has revealed to the media and the Department of Justice that companies knew that cigarettes were harmful and kept this information from the public.²³⁷ Wigand contends that Brown & Williamson had knowledge of the addictive nature of nicotine and the health hazards of many additives.²³⁸ The legal staff at Brown & Williamson

232. See Todd et al., *supra* note 227, at 256. By the early 1960s, Brown & Williamson understood that nicotine was addictive. See Glantz, *supra* note 229, at 220. It was not until 1979 that the Surgeon General reached the same conclusion. See *id.*

233. See Todd et al., *supra* note 227, at 256.

234. Glantz et al., *supra* note 229, at 220; Curriden, *supra* note 1, at 61.

235. See Glantz et al., *supra* note 229, at 220. At these hearings, chaired by Representative Waxman, U.S. Food and Drug Administration Commissioner David Kessler pointed to evidence of industry use of their research and patents involving nicotine manipulation. See Daynard, *supra* note 220, at 34. The CEOs of seven major tobacco companies responded by swearing that they did not believe nicotine was addictive. See *id.*

236. See Marie Brenner, *The Man Who Knew Too Much*, VANITY FAIR, May 1996, at 170, 172. Wigand, who has a Ph.D. in endocrinology and biochemistry, worked for health care companies such as Pfizer and Johnson & Johnson before becoming a Brown & Williamson employee in 1989. See Elizabeth Gleick, *Jeffrey Wigand Doesn't Live Here Anymore*, TIME, Mar. 11, 1996, at 57, available in 1996 WL 8824909. He was fired from Brown & Williamson in March 1993. See Brenner, *supra*, at 179.

237. See Elizabeth Gleick, *Where There's Smoke . . . Jeffrey Wigand is Making Incendiary Charges about the Tobacco Industry, Which is Out to Burn Him*, TIME, Feb. 12, 1996, available in 1996 WL 8824677.

238. See Brenner, *supra* note 236, at 173. Wigand brought a report from the National Toxicology Program, on the carcinogenic effect of the additive coumarin, to the attention of a Brown & Williamson executive and suggested removing the additive from their products. See *id.* at 178-79. The executive's

reportedly sent sensitive documents involving their in-house research overseas and told their staff to avoid making lists or memos.²³⁹ The company was hiding information that they contended was not true or did not exist.

As the "highest-ranking tobacco executive ever to turn whistle blower,"²⁴⁰ Wigand is viewed by many plaintiffs as the witness that can "personalize" allegations against the tobacco companies.²⁴¹ An insider such as Wigand may be better able to convince a jury when explaining the conduct and motives of a tobacco company.²⁴²

All of this evidence will assist plaintiffs with their current battle that focuses on deceit, fraud, and conspiracy committed by the tobacco companies.²⁴³ As cases progress, more information will be uncovered and shared with other plaintiffs. The Minnesota case has already exposed a 1973 research report from R.J. Reynolds which states that a competitor's success was the result of 'deliberate and controlled' nicotine enhancing methods."²⁴⁴ At the University of California at San Francisco, an archive has been established to house Brown & Williamson and other tobacco control documents. Access to these documents is available on the Internet.²⁴⁵

3. Settlement with Liggett

In March 1997, Liggett & Myers Tobacco, the smallest tobacco company in the United States, entered into a settlement agreement with twenty-two states that had cases pending against the company and confirmed the information disclosed by recent leaks.²⁴⁶ Liggett's

response was that such action would hurt sales. *See id.* at 179. On his own initiative, Wigand then investigated other additives and their effects. *See id.* The research and development concerning nicotine was handled by Brown & Williamson's overseas departments. *See id.* at 178.

239. *See* Brenner, *supra* note 236, at 177.

240. Elizabeth Gleick, *Tobacco Blues*, TIME, Mar. 11, 1996, at 54, available in 1996 WL 8824908.

241. *See id.* at 55.

242. *See id.*

243. *See* Curriden, *supra* note 1, at 61.

244. Weinstein & Nelson, *supra* note 5, at A1; *see also* text accompanying note 201.

245. *See* Tobacco Control Archives (last modified Aug. 4, 1997) <<http://galen.library.ucsf.edu:80/tobacco>>.

246. *See* John Schwartz & Sandra Torrey, *Tobacco Firm Settles 22 State Suits; Liggett Group Admits Cigarettes' Dangers, Agrees to Release Data and Testify*, WASH. POST, Mar. 21, 1997, at A1, available in 1996 WL 11255519. However, Blue Cross-Blue Shield of Minnesota, a plaintiff in the Minnesota suit, has refused to be a party to the settlement. *See id.*

chief executive officer, Bennett LeBow, agreed to make a statement that smoking causes various diseases, including lung cancer.²⁴⁷ In addition, Liggett conceded that cigarette companies target young people,²⁴⁸ meaning those who are under the legal smoking age.

In addition to these concessions, Liggett agreed to pay twenty-five percent of its pre-tax profits for the next twenty-five years to the states.²⁴⁹ The money is to be used to treat individuals with smoking-related illnesses and for an anti-smoking campaign.²⁵⁰ The company's cigarette packages are to be labeled with a stronger warning that states "smoking is addictive."²⁵¹

What is most valuable to current and future plaintiffs are the documents Liggett has agreed to release. Liggett will turn over approximately 250,000 pages of documents, some of which implicate the entire tobacco industry.²⁵² Those documents that involve other tobacco companies and the "Committee of Counsel,"²⁵³ however, may be protected by the "joint-defense" privilege.²⁵⁴ Therefore, rather than turning these documents over to the plaintiffs, Liggett is sending them to courts in the twenty-two states.²⁵⁵ Judges will then decide whether the documents contain non-legal matters or evidence of a crime or fraud, in which case they would not be protected by the privilege.²⁵⁶

In exchange for Liggett's cooperation, the twenty-two states have dropped their cases against Liggett. In addition, all present and future plaintiffs have been barred from suing the company, except for states which have not yet filed suit.²⁵⁷ These terms also ap-

247. See Milo Geyelin & Suein L. Hwang, *Liggett to Settle 22 States' Tobacco Suits—Company Agrees to Warn Smokers of Addiction, Turn Over Internal Data*, WALL ST. J., Mar. 21, 1997, at A3, available in 1997 WL-WSJ 2414032.

248. See *id.*; Schwartz & Torrey, *supra* note 246, at A1.

249. See Schwartz & Torrey, *supra* note 246, at A1.

250. See *id.*

251. Geyelin & Hwang, *supra* note 247, at A3.

252. See Milo Geyelin, *Liggett Settlement Puts Spotlight On Industry's Top Legal Group*, WALL ST. J., Mar. 24, 1997, at B5, available in 1997 WL-WSJ 2414052.

253. The industry contends that the committee was merely a way for a group of in-house counsel to discuss common legal topics. See *id.* A 1964 report detailing tobacco industry operations alleges, however, that the committee determined various policy issues such as research and public relations. See *id.*

254. See *id.*

255. See *id.*

256. See *id.*

257. The Attorney General of Arizona, Grant Woods, explained that they were not sure if the prohibition on other suits could work. See *id.*; see also Geyelin & Hwang, *supra* note 247, at A3.

ply to any company Liggett may merge with, except Philip Morris.²⁵⁸

The settlement agreement improves the plaintiffs' claims against the tobacco companies in several ways. Not only are the damaging admissions coming from a tobacco company, but many more documents are now available to support plaintiffs' claims. Plaintiffs will also be able to argue, due to Liggett's use of stronger warnings, that other tobacco companies are following a lower standard of care.²⁵⁹ All this places more pressure on the industry to follow Liggett's lead and join in an industry-wide settlement.²⁶⁰

4. Jury Verdict Against Tobacco

The theories of deceit and conspiracy, along with some of the new evidence, were at the center of plaintiff Grady Carter's case against Brown & Williamson.²⁶¹ The sixty-five year old began smoking prior to the enactment of the federal law requiring warning labels on cigarette packages, and forty-three years later he developed lung cancer.²⁶² Carter brought suit against Brown & Williamson based on negligence and strict liability, focusing on allegations that nicotine is addictive and that tobacco companies misled the public.²⁶³ Carter's charges against Brown & Williamson were strengthened by evidence which included internal Brown & Williamson documents.²⁶⁴

Jurors were angered by Brown & Williamson's hypocrisy in maintaining that smoking was safe while more and more of their own research revealed that it was in fact harmful.²⁶⁵ What resulted was the first jury verdict against a tobacco company. Carter was awarded \$750,000.²⁶⁶ Perhaps this will be the first of many plaintiff victories in the third wave as a result of the pooling of resources and newly discovered evidence.

258. *See id.* Many in the tobacco industry maintain that LeBow's settlement is merely an attempt to get another tobacco company to take over his failing company. *See* Schwartz & Torry, *supra* note 246, at A1.

259. *See* Geyelin & Hwang, *supra* note 247, at A3.

260. *See infra* text accompanying notes 267-77.

261. *See* B&W, *supra* note 20.

262. *See* Annas, *supra* note 184, at 306.

263. *See* B&W, *supra* note 20.

264. *See* Annas, *supra* note 184, at 306. This was the first case in which these documents were admitted into evidence. *See id.*

265. *See id.* This anger was revealed in interviews with three of the six jurors. *See id.*

266. *See* B&W, *supra* note 20.

5. Proposed National Settlement

In mid-April 1997, an unprecedented effort to end the battle between plaintiffs and the tobacco industry became public.²⁶⁷ Tobacco companies, including Philip Morris and R.J. Reynolds, entered settlement talks with an anti-tobacco alliance comprised of states' attorney generals, plaintiffs' lawyers, and public health advocates.²⁶⁸ By discussing a possible compromise with plaintiffs, the industry is acting in sharp contrast with its prior stance toward attackers.²⁶⁹

On June 20, 1997, the negotiators emerged from discussions to announce that the tobacco industry and the alliance had reached an agreement.²⁷⁰ The tobacco industry agreed to pay \$368.5 billion over the next twenty-five years,²⁷¹ comply with advertising and marketing restrictions,²⁷² and submit to FDA regulation of nicotine.²⁷³ The tobacco companies also agreed to take active and effective measures to reduce youth smoking.²⁷⁴ In exchange, tobacco companies

267. See Mark Curriden, *Litigants Talk Tobacco*, 83 A.B.A. J. 20, 20 (1997).

268. See *id.* at 21; see also Sandra Torry & John Schwartz, *Pro-Tobacco Verdict Could Fire Up Negotiations for Liability Settlement*, WASH. POST, May 6, 1997, at A9.

269. See *supra* note 179.

270. See John Schwartz & Sandra Torry, *Tobacco Pact Calls for Strict Federal Controls*, WASH. POST, June 21, 1997, at A1.

271. See *id.*; see also Jill Smolowe, *Sorry Partner*, TIME, June 30, 1997, at 24, 25. Three hundred and eight billion dollars will be paid to settle the suits brought by the states and other class actions. See *id.* at 27. Sixty billion dollars of the settlement is for punitive damages, of which \$25 billion will be used for public-health programs and health coverage for uninsured children. See *id.* The tobacco companies will also spend \$500 million each year to fund anti-tobacco programs. See *id.* Many persons are especially surprised at the tobacco companies' agreement to pay \$60 billion in *punitive* damages because it "is tantamount to an admission of moral wrongdoing, a stunning development for an industry that for 40 years has steadfastly refused to admit any culpability or accept any responsibility." *Id.*

272. See Schwartz & Torry, *supra* note 270, at A1. The use of human images and cartoon characters in advertising is prohibited, as are billboards, product placements in films, and merchandise with company names or logos. See Smolowe, *supra* note 271, at 25-27. The agreement also bans cigarette vending machines. See *id.* at 26.

273. See Schwartz & Torry, *supra* note 270, at A1; see also Smolowe, *supra* note 271, at 25. The FDA is given authority over the ingredients in cigarettes, including the ability to ban nicotine after the year 2009. See Schwartz & Torry, *supra* note 270, at A1.

274. See Schwartz & Torry, *supra* note 270, at A1. If under-age smoking does not drop by 30% in the next five years, 50% in seven years, and 60% in ten years, the industry will be fined \$80 million for each percentage point short of the

received immunity from future class action suits, and payments to successful individual plaintiffs were limited to \$5 billion a year.²⁷⁵ However, Congress and the President must approve the sixty-eight page agreement before it becomes law.²⁷⁶ The agreement may not receive such backing. Early reviews of the proposed settlement have already spurred criticism and debate.²⁷⁷

Even with its flaws, the proposed settlement signifies the strides plaintiffs have made in the long, hard battle against the tobacco companies. Armed with strong evidence, the coalition of states, plaintiffs' attorneys, and health advocates has proven to be a tough opponent for the tobacco industry. Instead of celebrating yet another victory, tobacco companies are contemplating what steps to take as the possibility of enormous losses becomes increasingly real. Present day suits are now the cause of true concern for the industry, as they never have been before.

6. Settlement with Mississippi

The industry's decision to pay the state of Mississippi \$3.6 billion is evidence of the tobacco companies' fears.²⁷⁸ As the July 9 trial date for Mississippi's suit²⁷⁹ was fast approaching, the four large-

target. *See id.*

275. *See id.* The industry had been seeking complete immunity from current and future suits, but this was the cause of much debate and dissention among the anti-tobacco side. *See id.* Texas Attorney General Dan Moragels and others maintained that they would not be a party to a settlement that provides such immunity to an industry that "ha[s] lied to the public for 40 years." Curriden, *supra* note 267, at 21. Although short of blanket immunity, the \$5 billion cap on what can be paid out annually provides the industry with predictability for stockholders, which has sent up the stock prices of Philip Morris and R.J. Reynolds. *See* Smolowe, *supra* note 271, at 24, 27.

276. *See* Schwartz & Torry, *supra* note 270, at A1.

277. *See* John Schwartz & Saundra Torry, *Fine Print in Tobacco Pact Draws Critics*, WASH. POST, June 22, 1997, at A9; *see also* Matthew L. Myers, *Look at . . . The Tobacco Settlement; Sign It; The Deal Will Save Lives Now—and in the Future*, WASH. POST, June 29, 1997, at C3.

278. *See* Milo Geyelin, *Mississippi Becomes First State to Settle Suit Against Big Tobacco Companies*, WALL ST. J., July 7, 1997, at B8. The companies will pay "3.6 billion over 25 years and \$136 million a year indefinitely thereafter." *Id.* The first payment of \$170 million will be paid July 15, 1997. *See* John Schwartz & Saundra Torry, *Tobacco Firms, Mississippi Settle; State to Be Paid Nearly \$3.4 Billion for Smoking-Related Health Costs*, WASH. POST, July 4, 1997, at A1, available in 1997 WL 1192239.

279. *See* Schwartz & Torry, *supra* note 277, at A1.

est tobacco companies²⁸⁰ agreed to settle with Mississippi for what amounts to be Mississippi's share of the \$368.5 billion proposed national settlement.²⁸¹ Therefore, even if the national agreement fails, the industry will never have to face Mississippi's charges in court.²⁸² The suit that to many was not worth a nickel has now yielded billions.²⁸³

IV. CONCLUSION

During the 1950s, the battle against the tobacco industry began with plaintiffs seeking recovery under deceit, breach of warranty, and negligence theories. Most of the first wave cases were easy victories for tobacco companies, but later cases like *Green*²⁸⁴ made the fight more difficult.

In cases brought during the 1980s, plaintiffs argued that cigarettes were "unreasonably dangerous" and failed the risk-utility test of strict liability.²⁸⁵ Again, tobacco companies defeated such attacks with the "freedom-of-choice" and assumption of risk defenses.²⁸⁶ During the second wave, tobacco companies also began asserting preemption defenses.²⁸⁷

In *Cipollone*, the preemption issue went before the United States Supreme Court, which held only failure to warn claims were preempted,²⁸⁸ bringing us to the current era of litigation. To help ease the burden and cost of litigation, claims are now brought by teams of plaintiffs in class actions and state claims. The conspiracy theories being developed during the third wave are supported by recently uncovered industry documents and insider testimony.²⁸⁹ Most recently, a jury decided in favor of a plaintiff in *Carter v. Brown &*

280. Those companies include Philip Morris, R.J. Reynolds, Brown & Williamson, and the Lorillard Tobacco Co. *See id.*

281. *See Geyelin, supra* note 278, at B8. Mississippi is guaranteed payment by the tobacco companies even if the national proposal fails. *See Schwartz & Torry, supra* note 246, at A1. If the national agreement becomes law, however, it will supersede the Mississippi settlement. *See Geyelin, supra* note 278, at B8.

282. Former attorney general of Maine, James E. Tierney, commented, "If you get to trial, all the truth comes out—and [the industry] can't stand that." *Schwartz & Torry, supra* note 246, at A1.

283. *See id.*

284. 409 F.2d 1166 (5th Cir. 1969) (en banc).

285. *See supra* text accompanying notes 87-115.

286. *See supra* text accompanying notes 116-26.

287. *See supra* notes 129-48.

288. *See supra* text accompanying notes 160-74.

289. *See supra* notes 227-45.

Williamson.²⁹⁰ In addition, the tobacco industry has agreed to a historic settlement proposal with states' attorney generals.²⁹¹

Perhaps a more stable and lasting shift in views will place responsibility upon the tobacco companies for the harm inflicted by cigarettes. However, it must be remembered that when the first cases went to trial many assumed the tobacco industry would be easily defeated. Instead, the industry has enjoyed over forty years of success. Even today, with the changing views of at least one jury and the industry's openness to compromise, the tobacco companies continue to sway some juries.²⁹² There is a lot of work ahead before plaintiffs may achieve their lasting victory, but success now appears within reach.

Ingrid L. Dietsch Field

290. See *supra* text accompanying notes 261-66.

291. See *supra* text accompanying notes 267-75; see also text accompanying notes 278-83.

292. On May 5, 1997, in *Connor v. R.J. Reynolds*, a jury found that the tobacco company was not liable for the death of Jean Connor. See Donald P. Baker, *Fla. Jury Finds R.J. Reynolds Not Negligent; Tobacco Firm had Argued Smoking is Personal Choice*, WASH. POST, May 6, 1997, at A1, available in 1997 WL 10691833. For over twenty years, Connor smoked up to three packs of cigarettes a day. See *id.* She died of lung cancer at the age of forty-nine, six months after filing suit. See *id.* Many were surprised at the defeat because of the success of the *Carter* case the year before. See *id.* However, some commentators reconciled the two verdicts by citing differences in the plaintiffs' behavior. See *id.* Carter "tried everything from hypnosis to a nicotine patch to stop smoking." See *id.* Conversely, Connor admitted knowledge of the health risks associated with smoking and did not try to quit until she was told she had cancer. See *id.* Others point to industry documents that were considered by the *Carter* jury, but were kept out in *Connor*. See *id.* As Matthew L. Myers of Campaign for Tobacco-Free Kids stated, "We've entered a new era in which plaintiffs will win some and companies will win some . . . without either side dominating the other." *Id.*